LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 5 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1925~~ 70-77

NORTH CAROLINA,

Petitioner

—v.—

WAYNE RICE,

Respondent

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM W. VAN ALSTYNE
Counsel Assigned by the
Court of Appeals
Duke University Law School
Durham, North Carolina 27706

INDEX

	PAGE
Citation of Opinion Below	3
Jurisdiction	3
Question Presented	5
Statement of the Case	5
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

	PAGE
Cherry v. Maryland, No. 244 (Md. Ct. of Spec. App., May 6, 1970)	9
North Carolina v. Pearce, 395 U.S. 711, 726 (1969)	5
North Carolina v. Rice, 434 F.2d 297 (1970)	5
Sefcheck v. Brewer, 301 F. Supp. 793 (S. D. Iowa 1969)	9
Torrance v. Henry, 304 F. Supp. 725 (E.D.N.C. 1969)	9
Sentences Increases on Retrial after North Carolina v. Pearce, 39 U.Cin.L. Rev. 427 (1970)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1325

NORTH CAROLINA,

Petitioner

—v.—

WAYNE RICE,

Respondent

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the United States Court of Appeals for the Fourth Circuit (App. A of Petition) is reported at 434 F.2d 297 (1970).

Jurisdiction

Jurisdictional requirements arising under 28 U.S.C. § 1254 (1) are satisfied in that review of this civil case is sought on petition of one of the parties for a writ of certiorari after rendition of judgment by the court of appeals, insofar as 28 U.S.C. § 1254 (1) authorizes that such a case "may be reviewed" by this Court should the Court otherwise conclude that issuance of the writ is appropriate under the circumstances.

Pages 2 AND 4
Blank

Question Presented

Was the Court of Appeals correct in holding that a State denies due process of law when it more harshly sentences a defendant following retrial for the same offense from which he appealed for a trial de novo and when:

a) The defendant "was exercising the *only* avenue afforded to review his conviction," (434 F.2d at 299) (emphasis added);

b) After recourse to this sole avenue of review and retrial for the same offense, the defendant received an active sentence more than twice as severe as that imposed upon him at the conclusion of the original trial;

c) This doubly harsher sentence at the conclusion of the second trial was imposed by the court itself and not by the jury;

d) No reason whatever appears in explanation of this severely harsher sentence "so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal," (*North Carolina v. Pearce*, 395 U.S. 711, 726 [1969]); and

e) There is consequently no way at all for any other court to determine whether the harsher sentence is in fact based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding," rather than upon "vindictiveness against a defendant for having successfully attacked his first conviction." *Id.* at 725, 726.

More succinctly, the question Petitioner would have this Court review is whether the Court of Appeals correctly applied this Court's holding in *North Carolina v. Pearce*, 395 U.S. 711 (1969), to the facts of this case.

Statement of The Case

On July 19, 1968, Mr. Wayne Rice was tried in a North Carolina General County Court upon his plea of not guilty to a charge of driving while intoxicated. Found guilty by

the court, he was sentenced to nine months in prison suspended upon payment of a $100 fine plus costs. This was Mr. Rice's first conviction for driving while intoxicated. Immediately following his conviction and pursuing the only course available to him for objecting to his conviction, Mr. Rice appealed to the Buncombe County Superior Court for a trial de novo. N.C.G.S. § 7-296.11. Two weeks later, on August 2, 1968, he was tried and found guilty of the same offense by a Superior Court jury. The presiding judge then imposed an active sentence of two years in prison—the maximum authorized by law. N.C.G.S. § 20-179.

The reasons for the imposition of this remarkably harsher sentence do not affirmatively appear in the record. Rather, "the record reveals nothing which warrants the increased punishment." (434 F.2d at 300.) All that appears is that as a result of exercising his sole statutory right to appeal, that providing for de novo retrial with sentence to be imposed by the court, Mr. Rice found himself sentenced to two years in prison. Had he been willing to forego his only right to appeal, he would have had to pay only a $100 fine plus costs. Reviewing these circumstances in light of this Court's decision in *North Carolina v. Pearce*, 395 U.S. 711 (1969), the United States Court of Appeals for the Fourth Circuit concluded (434 F.2d at 300):

> [W]e again see the more drastic sentence on the second trial as a denial of Federal due process, in that by discouragement it impinges upon the State-given appeal.

Although Mr. Rice had in the meantime completed his full two years of penitentiary service and had been unconditionally discharged from prison prior to argument and decision in the court of appeals, the court concluded that "injurious consequences" might nonetheless subsequently attach to the public record of his impermissibly severe sentence. (*Ibid.*) On that basis it concluded that the case was not in fact moot and that relief should be granted by remanding the case to the district court with directions to order that the record be expunged. Thereafter, the State sought *certiorari* from this Court.

Reasons For Denying The Writ

1. *The Decision Below is Clearly Correct.*

While never conclusive of this Court's discretion, and while inappropriate for development at length in this brief, the essential soundness of the Opinion and decision below in light of this Court's own most recent and emphatic pronouncements provide sufficient reason in themselves not to burden the Court or to postpone the effective date of the lower court's order through the exercise of the *certiorari* power.

The imposition upon Rice of a harsher sentence upon retrial for the same offense was a clear violation of the principles established by this Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969). The issue presented in *Pearce*, as stated by this Court, is exactly the same as the issue identically resolved by the court below in this case:

> When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial? (395 U.S. 711, 713)

In answer to that question, this Court declared:

> [S]ince the fear of . . . vindictiveness may constitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, Due Process . . . requires that a defendant be freed of apprehension of such a retaliatory motivation. (395 U.S. 711, 725)

It thereupon held that:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be

> made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. (395 U.S. 711, 726)

As the State in this case failed to produce any record whatever in explanation of the doubly severe harsher sentence imposed upon Mr. Rice following his retrial, much less a record disclosing objective information concerning any conduct on his part during the brief two-week interval between the imposition of the first and second sentences, the court below correctly concluded that the harsher sentence was imposed in violation of the Due Process Clause of the Fourteenth Amendment.

There is, accordingly, no point to review this case unless it is felt that there is some purpose to be served merely to reiterate what is otherwise obvious, a purpose which it is respectfully submitted may at most warrant issuance of the writ followed by summary affirmance of the decision below. It is clear, as determined by the court of appeals unchallenged by Petitioner in this Court, that at the time of his original conviction in the General County Court Mr. Rice's sole recourse was by appeal to the Superior Court for a trial de novo. He could not, under the applicable law of North Carolina, have appealed directly to any other court nor could he, by any other means, seek relief from any error he might believe to have prejudiced his trial. There can be no question, of course, that "apprehension of a retaliatory motive" (*Pearce* at 725) respecting sentencing after retrial de novo must as readily deter defendants from seeking relief from any felt injustice arising in the course of their trial in such an inferior court as a general county court, as it would in the case of one originally tried in a higher court of first instance. Indeed, while that chilling apprehension must be at least as great in both cases, the defendant's predicament in this case is made far more acute by the very fact that the less professional and less circumspect operation of the general county court (in which the judge need not be an attorney and no record is made of the proceedings) is itself much more

conducive to the probability of error in the proceedings than was likely in the kind of court, a Superior Court, in which Pearce was first tried. So it is that the court of appeals concluded in this case:

> On the strength of *Pearce*, we again see the more drastic sentence on the second trial as a denial of Federal due process, *in that by discouragement it impinges upon the State-given appeal.* (434 F.2d at 300). (Emphasis added.)

Indeed, the *a fortiori* application of *Pearce* to *Rice* had already been anticipated in *Torrance v. Henry*, 304 F. Supp. 725 (E.D.N.C. 1969). (See also *Sefcheck v. Brewer*, 301 F. Supp. 793 (S. D. Iowa 1969); *Cherry v. Maryland*, No. 244 (Md. Ct. of Spec. App., May 6, 1970) (harsher sentencing without explanation following retrial de novo held forbidden by *Pearce*; Alpin, *Sentences Increases on Retrial after North Carolina v. Pearce*, 39 U.Cin.L.Rev. 427 (1970).) Like *Rice, Torrance* arose on petition for a writ of habeas corpus in behalf of a North Carolina prisoner who, after being convicted in an inferior court and appealing to the Superior Court, was tried de novo, convicted again of the same offense, and given a greater (and unexplained) sentence than had been imposed by the inferior court. In his Opinion, Chief Judge Butler declared:

> Respondent contends that the *Pearce* case applies only in cases where there has been a successful attack on a conviction, not in cases of a trial *de novo* as presented here.
>
> Applying the reasoning underlying *Pearce*, we perceive no material distinction between a case where the defendant's original conviction has been set aside, whether by appeal or collateral proceedings, and a new trial ordered, and a case where the defendant has appealed his original conviction, and received a trial *de novo*. In either case a harsher sentence at retrial is a violation of due process, unless justified by the subsequent events requirement as enunciated in *Pearce*. (304 F. Supp. 725, 726)

In brief, *Pearce* stands for the proposition that a convicted defendant should not in any way be discouraged from seeking review of his conviction from fear of incurring

increased punishment unrelated to his own conduct subsequent to that conviction. Since requesting a trial de novo was the sole method of review open to Rice following his conviction in the General County Court, since the state provided no way whatever for him to seek redress from any kind of error which might have tainted his conviction without incurring a flat risk of purely vindictive and utterly retaliatory harsher sentencing not thereafter subject to any meaningful review due to the absence of explanation appearing on the face of the Superior Court record, the decision in the court below was indubitably correct and so wholly an unexceptional application of *Pearce* as clearly not to warrant further consideration by this Court.

2. *The Issue Allegedly Presented Is Inappropriate For Review By The Court At This Time And, In Light Of The Factual Record, The Case Itself Is Singularly Inappropriate For Further Consideration.*

Petitioner cites no case which has arisen within the Fourth Circuit subsequent to and at variance with the decision below. There is, as a consequence, no decisional conflict currently existing within the circuit and thus no need for this Court to grant the writ merely to resolve such differences as may never arise. Respectfully, moreover, Respondent submits that it is premature to anticipate any such conflict in the absence of providing a reasonable opportunity to the several state supreme courts within the fourth circuit to consider the *ratio decidendi*, as well as the holding, in this case.

The capacity of this Court to reconcile such differences as might arise in the future (and no reason is yet apparent to suppose that there will in fact be any differences) may in any event be enhanced by providing an opportunity to these courts as well as others to consider the matter and to develop any additional facts which might appropriately suggest some tenable distinction or limitation upon the case. Indeed, as noted in Petitioner's brief itself (at p. 4), only one other federal court of appeals has yet had any occasion even to consider the particular issue raised by

this case, in spite of Petitioner's own declared view that the problem which that issue allegedly presents is one which may be shared in at least twenty-three states. Surely, then, it is premature to act in the absence of knowing whether in fact the decision may be regarded as generating any problem at all or whether any State may think the decision in the slightest degree incompatible with its capacity for the fair administration of justice.

Given the fact that the decision below exhibits no departure from any decision of this Court but, to the contrary, merely articulates a specific and reasoned application of this Court's very recent holding in *North Carolina v. Pearce*, given also the absence of any compelling need to review the particular order of the court below in order to protect any interest of the state immediately affected by that order (*i.e.*, the State had already unconditionally released Mr. Rice even before argument and decision in the court below), and given the state of the Record in this case with its utter lack of any attempt to justify the shockingly severe increase in punishment following Rice's sole recourse by way of statutory appeal, it is respectfully submitted that this case is singularly inappropriate for further consideration.

Conclusion

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

William W. Van Alstyne
Counsel for Respondent